IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No.466 of 1999

Judgment reserved on:14.3.2006

Date of decision: 27.03.2006

State of Himachal Pradesh Appellants

Versus

Munish Kumar and others Respondents

Coram:

The Hon'ble Mr. Justice Deepak Gupta, J.

Whether approved for reporting ? NO

For the appellant(s):Mr.J.S.Guleria, Law Officer

For the respondent(s):Pt.Om Parkash,Advocate

Deepak Gupta,J.

This appeal by the State is directed against the judgment of the learned Chief Judicial Magistrate, Kangra at Dharamsala in Criminal Case No. 74-III/94,43-I/94 RBT 50-III/96, decided on 20.4.1999 whereby the accused have been acquitted of having committed the offence under Section 61(1)(a) of the Punjab Excise Act.

The prosecution case in brief is that on April 15, 1994 around 12.30 a.m. when ASI Gurmail Singh alongwith some other constables was on patrolling duty near the crossing close to the Red Cross Office, Dharamsala, a Maruti Van No. HP-02-3570j came from the Charan Khad side. The police party stopped the Van. It was being driven by Ravi Kumar accused, while

accused Manish Kumar and Jiwan Dass were sitting on its back seat. A search of the van yielded 13 cartons of various types of Indian Made Foreign Liquor (IMFL). 3 cartons contained 36 bottles of Fine XXX Rum, 1 carton contained 48 sealed pints of Swingers Gin, 1 contained 48 sealed of Haywards Fine Whisky, 3 contained 72 sealed halves of Fine XXX Rum, 1 contained 24 sealed halves of VRV XXX Rum and the remaining 4 contained 192 sealed pints of Fine XXX Rum. According to the prosecution the accused persons failed to produce necessary permit with regard to the possession and transportation of liquor. Accordingly the cartons together with the bottles were seized and sealed. Samples were taken and were sent for analysis to CTL, Kandaghat. After receipt of the chemical examiner's report confirming the contents of the sample to be alcohol and on completion of investigation the three accused were charge-sheeted for having committed an offence of the Act. The accused pleaded not guilty and claimed trial. The prosecution examined 5 witnesses in support of its case. Thereafter the statements of the accused under Section 313 Cr.P.C. were recorded.

At this stage it would be pertinent to refer to the stand taken by the accused in their statements under Section 313 Cr.P.C. In answer to the question as to why the prosecution witnesses have deposed against them, all the accused have given similar versions. The

answer of Manish Kumar, who was a Salesman in a liquor vend is as follows:-

> "The independent witness Kuldip Singh did not support the prosecution case. However, the police officials being interested in the success of the case gave false and concocted account. I have been falsely implicated in this case. The fact of the matter is that I was serving as salesman at a liquor vend located in the Kacheri Adda area on 15th April, 1994 around 10.00 a.m. The aforementioned Cartons were taken out of liquor vend and placed in front of in order to clean the liquor vend. Just then ASI Gurmail Singh arrived and demanded two cartons of Whisky. Upon my refusal to oblige he summoned my co-accused Ravi Kumar, a driver of the aforementioned van and asked co-accused Jiwan to load the cartons in the van parked near the spot of occurrence. However, upon their refusal so to do, they coerced j into loading the cartons in the van which was then got drive to police station, Dharamsala, and all 3 of us were framed in the instant case."

Accused Jiwan Das has made a similar statement though according to him he drives a taxi which he had parked near the Kachehri Adda and was asked by ASI Gurmail Singh to load the liquor cartons lying outside the liquor vend in the Maruti Van. When he and co-accused Jiwan did not oblige, they were forced to load the cartons and made to drive the vehicle to the police station where they were falsely implicated. It would also be pertinent to mention that accused Manish also filed an application for release of the liquor before

the trial court. In fact the trial court passed an order directed that the seized liquor be released in favour of Manish Kumar on his furnishing surety bond, but this order was set aside by the learned Sessions Judge.

From the above facts it is clear that even the accused do not deny the fact that the liquor was seized by the police from the van. However, their version is that when the salesman Manish Kumar failed to oblige Gurmail Singh, he forced the other two accused, Jiwan Dass and Ravi Kumar to load the cartons on to the vehicle and forced them to drive the vehicle to the police station and implicated them in a false case.

The learned trial court has acquitted the accused only on one short ground. According to the trial court since the police has not followed the procedure laid down in Section 100(4) Cr.P.C. inasmuch as it did not associate two or more independent and respectable inhabitants of the area with the search operation, the whole search was vitiated and rendered nugatory.

Admittedly a vehicle such as Maruti Van in question falls with the definition of `Place' as defined in Section 2(p) of the Cr.P.C. which reads as follows:-

> "2(p) "place" includes a house, building, tent, vehicle and vessel;

Section 100 Cr.P.C. deals with the provision relating to searches and Section 104 reads as follows:-

> "104. Power to impound document, etc., produced.- Any Court may, if it thinks fit, impound

any document or thing produced before it under this Code."

In the present case admittedly the police did not associate two independent witnesses. Only one independent witness, Kuldip Singh was associated. Kuldip Kumar appearing as PW-1 did not support the prosecution version at all. He in fact was declared hostile whereas according to the prosecution he was a witness to the search and recovery of the 13 cartons of liquor. He in stated that no van was stopped nor any liquor recovered in his presence.

PW-1 Kuldip runs a small tea stall opposite the police station. In cross examination he has admitted his signatures on Ex.PW-1/A and Ex.PW-1/B on the seizure memos marks `A' and `B' which were later proved as Ex.PW-4/A and Ex.PW-4/B. However, he states that in fact he had refused to sign, but he was forced to sign by the police. He has denied the entire story of the prosecution with regard to stopping of the van and recovery therefrom.

PW-2 Arvind Kumar is a constable. PW-3 is the Head Constable, who was part of the search operation and pW-4 is Gurmail Singh, the ASI, who was the head of the patrolling party which stopped the van.

PW-5 has recorded the FIR on the basis of the report made to him by Om parkash. He also states that on 15th April, 1994 ASI Gurmail Singh had deposited

13 cartons of liquor and 13 sample which were sent for chemical analysis. These witnesses have totally supported the prosecution version.

I have heard Mr.J.S.Guleria, Law Officer and Pt. Om Parkash, learned counsel for the accused.

According to Mr.J.S.Guleria, Law Officer, mere non joining of independent witnesses would not be a sufficient ground to totally vitiate the search and render the prosecution null and void. He submits that the conviction can be based even on the evidence of the police alone. On the other hand, Pt. Om Parkash, Advocate, submits that admittedly the van was stopped in the middle of Dharamsala town in an area which has a number of residences, shops and offices and, therefore, the non joining of independent witnesses is fatal to the prosecution.

In my opinion there can be no hard and fast rule that there can be no valid search without associating independent witnesses. There can be instances where the investigating officer(s) or the search party makes efforts to join witnesses, but no independent witnesses are wiling to join as witnesses. The court cannot shut its eyes to the fact that members of the public large generally loathe to associate themselves with police investigation since they perceive that they may have to visit the police station and the courts time and again. On the other hand, the rights of

the accused have also to be kept in min. The police must show that either no witnesses were available or that despite making efforts no witnesses came forward to be associated in the investigation. If this is not done, then the evidence of the police officials must be scrutinized with extra care and caution and the conviction should only be recorded if the court is absolutely satisfied that search was actually conducted and the prosecution recovered the illicit material.

In the present case, however, I need not go into this question in detail. Here the accused have not denied the fact that the liquor was in fact recovered from the vend. They have also not denied their presence in the van. However, according to them the van was not stopped near the Red Cross Office. The defence set up is that the premises of the liquor vend were being cleaned. April 15th being Himachal Day is a public holiday in Himachal Pradesh and is normally a dry day. Therefore, the cartons have been kept outside the liquor vend so that the vend could be cleaned. According to the defence, in the meantime, PW-4 Gurmail Singh came and asked for liquor. This suggestion has been put to the witnesses also. When Gurmail Singh was not given the liquor he got very angry and thereafter forced the accused to load 13 cartons on to the Maruti Van and take them to the police station. Thereafter the case was lodged.

In the present case no doubt the area, i.e. the Red Cross Office is a reasonably well populated area. According to the prosecution, witnesses were not present since it was a holiday. However, there is variation in this regard between the statements of PWs 3 & 4. Whereas PW-3 states that some persons were present, PW-4 states that nobody was present. Be that as it may, I am of the view that this fact is not very material since the accused Manish does not deny the fact that the liquor actually belong to the owner of the Van.

It is an admitted fact that the vend also situated in the Kachehri area, next to the petrol pump. In fact this suggestion has been put by the accused to the prosecution witnesses. It cannot be believed that a police official in the middle of the day in full public glare would threaten the witnesses in a manner as stated by the accused. The plea taken by the accused is similar to a plea of alibi. It was for them to have led some evidence to show that they had been falsely implicated and that liquor was from the outside the liquor vend. It is also difficult to believe the version of the accused that three accused persons could be forced by PW-4 in the middle of the bazaar to load the van with 13 cartons of liquor against their wishes and then take it to the police station. Once this defence had been taken, some evidence should have been led to prove this fact. In my

view, in the present case, the version of the prosecution is correct. There is no reason to doubt the statements made by the police officials. All the police officials have clearly stated that 13 cartons of liquor were recovered from the vend near the Red Cross Office. Obviously, the police could not have planted 13 cartons of IMFL. This in fact is not the case of the accused. It cannot be believed that the police officials would falsely implicate the accused because one of them, i.e. accused Manish Kumar refused to hand over some liquor to PW-4. Even if the version of Manish Kumar is believed that some demand of liquor was made by Gurmail Singh, then also there was no reason why the other two accused should have been falsely implicated by the police.

In my view the prosecution has proved to the hilt that the accused were in illegal possession of 13 cartons of liquor and were illegally transporting the same and, therefore, are guilty of having committed an offence under Section 16 (1) (a) of the Act. Al of them are held guilty of such an offence. The impugned judgment of the learned Chief Judicial Magistrate, Kangra at Dharamsala in Criminal Case No. 74-III/94, 43-I/94 RBT 50-III/96 acquitting the accused is set aside and they are convicted of having committed such an offence.

As far as sentence of Manish Kumar is concerned, since Manish Kumar appears to be the principal offender, he is sentenced to undergo simple

imprisonment for 3 months and to pay fine of Rs.2,000/-. As far as accused Ravi Kumar and Jivan Dass are concerned, they appear to be accessories in the crime only and they are sentenced to one month's imprisonment each and directed to pay fine of Rs.2,000/- each. IN default of payment of fine by all the accused, they shall be liable to undergo further rigorous imprisonment for one month.

The accused are directed to surrender to the police within 8 weeks from today failing which the trial court shall take suitable steps to ensure the arrest of the accused.

The appeal is disposed of in the aforesaid terms.

March 27, 2006(K) (Deepak Gupta), Judge